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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM AND 5 WEST AMUSEMENT COMPANY,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

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v.

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Appellee.

ON APPEAL TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

QUESTIONS PRESENTED

I. Is the motion picture, "I Am Curious (Yellow)", obscene under the three pronged test enunciated by Mr. Justice Brennan in *Memoirs*?

II. Is the film obscene under the test proposed by Mr. Justice Harlan, Mr. Justice Blackmun, and Mr. Chief Justice Burger?

III. Is the film obscene under the test enunciated by Mr. Chief Justice Warren?

IV. Is the film obscene under the *Roth* test as defined by Mr. Justice White and Mr. Justice Clark?

V. Is the film obscene under the hard core pornography test of Mr. Justice Stewart and the absolute concept of the First Amendment adhered to by Mr. Justice Black?

VI. Is the three-pronged test a proper test for judging obscenity in any media?

VII. If the three-pronged test is a proper test, should it be applied to motion pictures as well as books?

VIII. Has Grove Press pandered the sex in the film?

IX. Is the Maryland censorship statute unconstitutional?

X. Is Maryland bound by the finding of the Second Circuit Court of Appeals?

XI. Does this Court's holding in *Stanley v. Georgia* foreclose the States from prohibiting the commercial dissemination of obscene materials?

XII. Were Appellants deprived of due process?

STATEMENT

The Maryland State Board of Censors, on July 8, 1969, disapproved an application to license the motion picture film, "I Am Curious (Yellow)", upon a finding that it was obscene, applying the standards set forth by this Court, as adopted by the Court of Appeals of Maryland. In accordance with Article 66A, Section 19, of the Annotated Code of Maryland, the Board on July 11, 1969, promptly filed a petition in the Circuit Court of Baltimore City for a judicial determination of the issue of the obscenity of the film. The case came on for hearing within the time limitations set forth in the statute, with the Board having the burden of proof in accordance with the statute. The trial court viewed the film, heard testimony of numerous witnesses over a two-week period, and viewed the film again before reaching a decision. The Court filed an order, within the

two-day period allotted by the statute, disapproving the film for licensing upon a finding that the film "is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value." An appeal was promptly entered from this judgment and order.

In accordance with the statute, the case was advanced for argument in the Court of Appeals of Maryland. The Court of Appeals, in a four to three decision, affirmed. The majority, in an opinion by Judge Finan, found that the movie was obscene under the tridentated test set forth by several justices of this Court in *"A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'" v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966). This test, although only subscribed to by three justices of this Court, has generally been referred to as the holding of this Court in that case, and it is the test which the Maryland courts have adopted. Judge Barnes concurred in the finding that all three tests had been satisfied, but he went further. He found evidence of pandering as envisaged by this Court in *Ginzburg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966). He also found that the third independent test, i.e. that the material must be "utterly without redeeming social value," is not to be applied to motion pictures, but rather that the standard adopted by this Court in *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," is the rule

governing motion pictures. The following passage in the dissenting opinion sums up the view of the minority of the Court: "Because I think the film is not 'utterly without redeeming social value,' I would (reluctantly and with regret) reverse the court below."

SUMMARY OF ARGUMENT

I-V. This Court has held that obscenity is not protected by the First Amendment, but there has been a divergence of opinion in the Court as to exactly what test and what procedure is to be employed in determining the obscenity issue. Appellee submits that the film "I Am Curious (Yellow)" is obscene under all of the tests which have been adopted by the various Justices. The film is clearly obscene under the test enunciated by Mr. Justice Harlan and subscribed to by Mr. Chief Justice Burger and Mr. Justice Blackmun. Application and adoption of this test by a majority of the Court in this case will give the States a Constitutionally sound resolution of the obscenity issue. The State action here meets the necessary requirements to assure affirmance — an accepted test for obscenity was used, and there was certainly reasonable evidence to support the State Court finding. The film is also clearly obsence under the test adopted by Mr. Justice White and Mr. Justice Clark whereby an independent social value test is not superimposed on the *Roth* standard. The alleged presence of such independent modicum of social value was the key factor not only in Judge Friendly's concurring opinion in the Second Circuit which was decisive to bring the film through customs but also in the dissent in the Maryland Court of Appeals. Without the independent application of the social value test the movie would have been held to be obscene by all the learned Judges who have considered it below. The movie is also obscene under the tridentated *Memoirs* test heretofore subscribed to by Mr. Justice Bren-

nan. This was the test employed by the trial court and the Maryland Court of Appeals in their findings that the film is obscene. These findings were based on a viewing of the film and on expert testimony as to each of the three tests. The film's extensive explicit display of a smorgasbord of sexual activity with a transparent façade of social value certainly justifies the holding of the Maryland Court. Under the hard-core pornography test of Mr. Justice Stewart we can only surmise the fellatio, cunnilingus, and multiple explicit scenes of copulation should satisfy the "I know when I see it" criteria. Consistent with the views expressed by Mr. Chief Justice Warren that a finding of obscenity by the Court below should be affirmed on appeal if supported by "sufficient" evidence, the action of the Maryland Court merits affirmance.

VI and VII. Mr. Justice Brennan's opinion in *Memoirs*, joined in by only two other members of the Court, which acted to impose an independent utterly without socially redeeming value test, has been generally accepted as the holding of the Court in that case. The three independent tests set forth in that opinion have become the standard for judging obscenity. Is this in fact the proper test? Appellee submits that it is not — a majority of this Court recognized in *Roth* that obscenity is not protected by the free speech provision of the First Amendment, and they drafted a viable test for determining the issue. A minority of the Court in *Memoirs* has effectively distorted this test so as to practically render it ineffective. The independent application of a utterly without socially redeeming value test is not warranted, and should be specifically rejected by the Court, as pointed out in the dissents of Mr. Justice White and Mr. Justice Clark in *Memoirs*. The majority *Roth* test, without its amendments by a minority of the Court, should be the test.

If our argument is rejected and the three-pronged test of *Memoirs*, is to be the standard, it should be limited to books and not applied to motion pictures. The Court has recognized that movies are of a different nature than books, and Counsel for the book distributor in *Memoirs* specifically argued that the independent social value test should be limited to books. Accordingly, we submit that the *Roth* test as originally enunciated should be applied to motion pictures and that Mr. Justice Brennan's *Memoirs* test be limited to books if it is to be given any effect at all. The movie at issue is the strongest argument for such an approach. To allow the transparent facade of social value to rescue the extensive pornographic sexual displays and thus give Constitutional protection to the movie is to reject the express holding in *Roth* that obscenity is outside the protection of the First Amendment.

VIII. The publication and dissemination of the scenario with its perverse emphasis on the sexual activity featured in the picture, in conjunction with the movie's distribution, constitutes the pandering proscribed by *Ginzburg*. The scenario speaks for itself in its emphasis on the explicit sex of the movie, and testimony at trial further developed this point. Additionally, Judge Barnes, in his concurring opinion in the Maryland Court of Appeals expressly found that the sex in the movie was being pandered by Grove Press: "It thus appears that the pandering of sex in the motion picture is generated entirely by the profit motive. By the concentration on sex in the scenario, Grove Press sells the book and by selling the book it sells the sex in the motion picture."

IX. Appellants have attacked the Maryland censorship on five grounds. This Court considered this statute in the *Freedman* case and enumerated there its constitutional defects. These defects were corrected by legislative action

and the statute as redrafted has been held to be constitutional by the Maryland Court of Appeals. That Court has held that the obscenity standard to be employed by the Censor Board pursuant to the statute is the standard set forth by this Court, and this is the standard used by the Board in judging the movie at issue and all other movies.

X. Appellants argue that the decision of the Second Circuit Court of Appeals in a federal customs case is binding on the Maryland Courts in the enforcement of the Maryland censorship law. This argument is in derogation of our federal form of government, and is based on a misconstruction of the cited case law.

XI. The primary issue in this case is the obscenity *vel non* of the film "I Am Curious (Yellow)" and the test to be applied. Appellants' *Stanley* argument is fully briefed in the *Karalexis* case now before this Court, and can best be determined there. Appellants have elected to ignore the precise holding of the Court that limited *Stanley's* effect to private possession of obscene materials and left the holding of *Roth* as viable Constitutional doctrine.

XII. There was no deprivation of due process. The attorney's work product of both parties was withheld from the other and this is in accord with established evidentiary rules.

ARGUMENT

I.

THE MOTION PICTURE, "I AM CURIOUS (YELLOW)", IS OBSCENE UNDER THE THREE-PRONGED TEST OF *MEMOIRS*.

The Court of Appeals of Maryland has heretofore adopted the three-pronged test for obscenity set forth by Mr. Justice Brennan in *Memoirs, supra.* It applied the test

in ruling on the obscenity of the subject film. The majority opinion analyzed and applied each of the three independent criteria. The thrust of the opinion is best summarized by the Court in its own words:

> "This Court has little difficulty in finding that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters. It is only with regard to the third element of the 'Roth-Alberts' tests as set forth in *A Book v. Attorney General, supra*, which must coalesce with the other two standards, which presents any occasion for pause. However, after reviewing all of the evidence in a light most favorable to the appellants' contention that the film does have something of social value, it is our judgment that it is utterly without redeeming social value."

In applying this test, it has been recognized that expert testimony is not necessary to establish the obscenity of a work when it is patently obscene. *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965); *City of Chicago v. Kimmel*, 31 Ill. 2d 202, 201 N.E. 2d 386 (1964); *Kahm v. United States*, 300 F. 2d 78 (5th Cir., 1962). *Dunn v. Maryland State Board of Censors, supra*, makes it clear that in rare cases the Censor Board can meet its burden of persuasion on the obscenity issue by merely showing the film itself. "I Am Curious (Yellow)" is such a "rare" case. It qualifies in this respect because of the extensive pornographic display of sex in the movie. Webster's New International Dictionary (2nd Edition) defines "rare" as being of an uncommon nature or quality.

The only significant case involving a movie in which the Supreme Court wrote an opinion on the issue of obscenity *vel non* rather than deciding this issue *per curiam*,

Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964), involving the movie, "The Lovers." Mr. Justice Goldberg, in a concurring opinion, described the display of sex in that movie:

> "I have viewed the film and I wish merely to add to my Brother Brennan's description that the love scene determined objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed. Except for this rapid sequence the film concerns itself with the history of an ill-matched and unhappy marriage — familiar subject in old and new novels and in current television soap operas."

Appellee submits that the pornographic display of sex in this movie qualifies it under the *Dunn* standard as the "rare case where there could be no doubt that the film is obscene . . . [in that it] not only speaks for itself but screams for all to hear that it is obscene." Sexual activity is rampant and the portrayal of a multiplicity of sex acts is absolutely without restraint. The content of the movie in this respect is vividly portrayed in the scenario (introduced as Respondent's Exhibit No. 9). The uncommon sex in the movie is: (1) Lena's singing, "In Rio de Janeiro you can fuck for free" (p. 13); (2) the display of erotic Indian sculpture depicting a man with his hand on a woman's vagina (p. 17); (3) the discussion between Lena and another girl about different methods of masturbation (p. 45); (4) Lena's dialogue, "Are you that fucking stupid?" (p. 4) and "so you don't give a shit about it, eh" (p. 55); (5) detailed love-making scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Börje caressing the girl's breasts with his tongue (pp. 71-86); (6) scene depicting sexual intercourse between Börje and Lena on the palace balustrade in which,

although the parties are clothed, the act of intercourse is vividly displayed (pp. 89, 90); (7) scenes of nudity at the retreat and scene depicting Lena looking at a sex manual showing various unusual positions for sexual intercourse (pp. 119, 120); (8) scene at the retreat showing Börje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena kissing Börje's penis as he caresses her vagina (pp. 124-129); (9) a discussion regarding sex which "makes them both horny" (pp. 133-134); (10) scene depicting intercourse in the water (pp. 139, 140); (11) scene depicting sexual intercourse in a tree between Lena and Börje (pp. 141-143); (12) scene showing fully the naked bodies of the two lying on the floor engaged in either sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation (pp. 148-150); (13) followed by a scene fully showing Börje's genitals, followed by a scene in which the nude Börje chases the nude Lena from one room to another, throws her to the floor and mounts her in a position of sexual intercourse. They then are shown with loins entangled, copulating on the floor (pp. 152-156); (14) fantasy scene in which Lena shoots Börje and castrates him with a knife (pp. 157, 158); (15) Lena's dialogue, "He is a big fucking shit and I'll kill him when I get hold of him. I'll cut off his cock" (p. 159); (16) nudity at the clinic with again an emphasis on the genital area of the male and female (p. 179).

This is the unusual and perverse display of pornography which renders this film obscene in and of itself. Judge Thomas Murphy of the United States District Court for the Southern District of New York, in the course of the case in which the jury found this film to be obscene, held the government had proved a *prima facie* case by merely

exhibiting the movie. Grove Press argued that the government's proof was insufficient as a matter of law because the government relied on the film alone and it did not offer expert testimony to prove the prurient appeal and patent offensiveness of "I Am Curious (Yellow)". Judge Murphy rejected this argument, and held that the patent offensiveness and prurient appeal of the film was so apparent that independent proof as to either category was unnecessary. He noted that the sexual scenes in "I Am Curious (Yellow)" far transcended the material in other cases, and stated:

> "Except for the claimant's experts, we doubt anyone could honestly characterize the scenes as being anything but patently offensive. To force the government to bring experts to prove that they affronted national community standards, would be like bringing samovars to Toula. In short, we hold that where material is so patently offensive and its prurient appeal to the average person so apparent, the government is not required to offer independent proof as to either category."

This holding is well supported. To the same effect, see *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177, aff'd, 388 U.S. 456, 18 L. Ed. 2d 1317, 87 S. Ct. 2109 (1967) and *People v. Pinkus*, 63 Cal. Rptr. 680 (App. Dept. Super. Ct. Cal., 1967) in which the prurient appeal and patent offensiveness of films was held to be self-demonstrating.

Landau v. Fording, supra, provides the proper standard by which to judge the movie at issue. The Supreme Court in that *per curiam* opinion affirmed the California District Court of Appeals' finding that the film, "Un Chant d'Amour", a story of prison life, was obscene. At the trial level, the State produced only the film and rested. The distributor produced a number of witnesses with impressive credentials to testify for the movie.

The trial court twice viewed the film, and notwithstanding the testimony of witnesses for the distributor found it to be obscene standing on its own merits (or demerits as it may be) without any expert testimony being necessary to establish its obscene character. The California appellate court noted that the film was obscene standing alone in that it depicted acts of male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy. In many respects, the description resembles "I Am Curious (Yellow)". There are no scenes of overt masturbation in "I Am Curious (Yellow)", but there is a discussion between Lena and another girl about various methods of masturbation, and there is a studied preoccupation with the male and female genital area. The counterparts of fellatio and oral copulation in the film at issue are in the scene where Börje throws Lena to the ground and these acts ensue. Voyeurism is rampant in this movie as is nudity. The castration scene certainly demonstrates sadism, and sodomy is a distinct possibility in one of the intercourse scenes. Additionally, "I Am Curious (Yellow)" vividly depicts six different acts of sexual intercourse in various positions and locales.

The Supreme Court, by virtue of the nature of the issue, has become the "high court of obscenity". Having found *per curiam* that "Un Chant d'Amour" is obscene because of its sexual content, even though it portends to have socially redeeming value in portraying prison life, the same reasoning would require a finding of obscenity as to "I Am Curious (Yellow)" with its facade of socially redeeming value.

Appellee, accordingly, submits that the film at issue is obscene, *per se*, and that, therefore, expert testimony is not necessary to support the finding of obscenity.

Because this Court, in previous obscenity litigation, has made it clear that it is a dangerous trial tactic for the State to rely on the material alone without expert testimony on the obscenity issue, e.g., *Memoirs, supra*, the State, although convinced that the movie is obscene, *per se*, took the precaution of producing expert testimony. Dr. Paul Yaffe, a psychologist and educator, with impressive credentials, testified as to the dominant theme of the movie and as to the issue of socially redeeming value. His conclusions were that the dominant theme of the movie was a sexual theme which would appeal to the prurient interest in sex of the average person and that the film was utterly without socially redeeming value. Reuben Kramer, an artist of wide repute, in testifying as to socially redeeming artistic value, concluded that there was none. John Lewin, a former prosecutor in the area of obscenity with some substantial background in this area, was qualified as an expert as to contemporary community standards, and testified that this film was patently offensive in its sexual display, applying those standards. Mr. William S. Forshaw, a professional librarian, with the cinema as an avocation, was tendered as a literary expert, and an expert on the motion picture media, to testify as to the dominant theme of the movie, its patent offensiveness, and the socially redeeming value issue. He found that the dominant theme of the movie was its sexual theme; that it was patently offensive by contemporary community standards; and that it was lacking in socially redeeming value. In addition, the State introduced several articles written by prominent movie critics containing poignant criticism of the movie (attached to Record Extract in Appendix). State's Exhibit No. 5 was a review by Rex Reed which appeared in the New York Times. State's Exhibit No. 7 was a commentary of Alan Adelson in the Wall Street Journal on censorship in general, and this film's significance in this respect.

State's Exhibit No. 8 was a review of the movie by James Kilpatrick in the Los Angeles Times.

Judge Joseph L. Carter, the trial judge, in commenting on the experts produced by the State, stated that he felt each of them was qualified to testify as an expert in his particular field. He found that this testimony supported the Board's conclusion that the film is obscene, tested by the most rigorous standards laid down by the various Justices of the Supreme Court of the United States and by the Court of Appeals of Maryland.

Appellants also produced a substantial amount of expert testimony in the course of the trial. This testimony should be subjected to critical analysis in determining the weight to be given it. One of the most significant aspects of all of their opinions was their universal inability to agree as to what the dominant theme of the movie was, although they all claimed that it was not sexual. A chronology of the witnesses and their opinions in this respect reveals: Dr. Mackie — the abortive love story of the girl; Dr. Johnson — the state of culture in its broadest interpretations in Sweden, and, by extension, in the western world, and perhaps by extension in the modern world in general; Dr. Mackie — the dominant theme deals with a young woman's attempt to come to grips with basic personal problems of growth; Dr. Rossi — criticism of existing society; the dominant theme says that we need a society within which people are a lot more honest with one another and that considerably more personal freedom is necessary in order for people to fulfill themselves; Dr. Paulson — disruption of contemporary society and the disruption between the generations; Dr. Brown — two predominant themes, one a presentation of Swedish life and Swedish conservatives, and the other the workout of the girl's sense of self-relationship to this Swedish life and to her environment around her; Dr.

Ehrhardt — development and portrayal of the heroine, Lena; and Mr. Stephany — three concurring themes, character development of the girl, the director of the film searching for a theme, and social unrest which exists in Sweden and almost all of the countries among all of the youth.

This confusion among the film's proponents as to what the dominant theme is, is compounded when we make reference to the expert testimony offered in the New York federal case, *United States v. A Motion Picture Entitled "I Am Curious (Yellow)"*, 404 F. 2d 196 (1968). Judge Hayes summarized the opinions of the witnesses in this respect in footnote 2 of the opinion.

This inability of Appellants' witnesses to agree on a dominant theme is accorded its proper significance by the appellate court in *Landau v. Fording, supra:*

> ". . . we think it a significant indication of the film's failure that none of the witnesses produced could agree on its dominant theme. We note that in Jacobellis, supra, in holding that the film, 'The Lovers', was not obscene, the court had no problem of ascertaining the theme or plot of the film . . .".

Added significance is given to this aspect of the case when we consider that the witnesses produced by the State as to this issue were in agreement that the dominant theme is sexual. It might well be that the experts testifying for the film, in an attempt to get away from the striking sex theme, groped for some other theme and grasped whatever they were able to conjure up — their striking lack of agreement would support such a hypothesis.

It is most important to note that the Appellant tendered no witnesses on the second of the *Memoirs* tests, i.e., whether the material in the film is patently offensive because it affronts contemporary community standards re-

lating to the depiction or representation of sexual matters. This is readily understandable in that there can be no question but that the explicit sexual displays go well beyond the community standards, whether national or local. Judge Hayes, in the 2nd Circuit case, noted: "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts." Judge Friendly, in his concurring opinion, agreed that the extensive displays of nudity and sexual activity are offensive, as did Chief Judge Lumbard in his dissent. A majority of this Court has not yet indicated whether the national or local community is the proper measure. Whether local or national, contemporary community standards, by definition, are a flexible concept. If this film is allowed to be shown, its sexual displays become the new community standard. If "I Am Curious (Yellow)" should become the contemporary community standard as to what is allowable in the display of sexual matters, there can be no restraint upon pornography in motion pictures. In such event, the holding of this Court in *Roth and Jacobellis* that obscenity is not protected by the First Amendment will become empty and meaningless. The new contemporary community standards that would prevail if the subject film is found not to be obscene would sanction the explicit showing of male and female genitals, the depiction of cunnilingus, and fellatio and other perverted practices, and the depiction of intercourse between man and woman shown fully nude in a variety of positions and locales. This film runs the full course of sexual activity excepting certain deviant sex. With this film as the standard, and applying the principle that the three elements must coalesce, a film can be wholly devoted to sex (the

dominant theme area), and it can be utterly without socially redeeming value, but it still cannot be censored because there are no longer any community standard limits on the display of sex. Appellants have avoided this issue, but it must be considered by this Court. If restraint on obscenity in motion pictures is to be a viable concept, this movie must not be awarded the protection of the First Amendment.

Appellants' only argument as to the second of the three-pronged tests is that because a great number of people have seen the movie, this indicates that it is acceptable by contemporary community standards. Concededly, a great number of people have seen the movie — curious people interested in why this movie has raised such a furor — but this is not indicative that the community, national or local, does not find the sexual display to be offensive. The substantial amount of litigation directed against the movie throughout the country noted in the Appendix to Appellants' Brief demonstrates the popular reaction to the patent offensiveness of the movie. They might go see the movie in order to satisfy their curiosity, but this does not in any way indicate that they readily accept the pernicious sexual smorgasbord to which they are subjected. To view the extremism of "I Am Curious (Yellow)" is one thing, but to accept its insult to morality as a prevailing contemporary standard is something else again.

Several of Appellants' witnesses testified that the director is a serious artist — serious, Appellee would submit, upon making sexually provocative movies in order to reap the benefits at the box office. Assuming, *arguendo*, that he is a serious artist with serious artistic intent in making this movie, this is in no way determinative. Again, reference is made to *Landau v. Fording, supra*, for the governing law. The Court there noted:

> "The fact that the writer, director, and producer of the film, Jean Genet, is a French writer of renown does not, as appellant argues, settle the question of whether the film contains sufficient artistic merit. Great artists can create the type of 'hard-core' pornography proscribed by our statute."

Several of Appellants' witnesses testified that the film is strongly put together and that it is a meaningful, cohesive, artistic production. This is belied by the rather humorous commentary by Rex Reed in his Review (State's Exhibit No. 5) in the New York Times, *supra*, concerning a screening of the movie for critics where a reel was left out; this was noticed by the projectionist, and the reel was shown at the conclusion of the film. The critics were unable to determine where the reel was to fall in the logical sequence of events.

This Court has the opportunity to see this movie as part of these judicial proceedings. The viewing is necessary if the *de novo* review, as contemplated by Mr. Justice Brennan's *Memoirs* test, is to be undertaken. This will give the Court the opportunity to apply sound judicial reasoning and concomitant common sense to Dr. Mackie's statement that without the sexual scenes the movie would be "spotty" and would "verge on incoherence"; Dr. Rossi's statement that the film would not be an honest one without the sex scenes; Dr. Paulson's testimony that each and every one of the sexual encounters was necessary in order to develop the dominant theme which he found in the film; Dr. Ehrhardt's testimony that it was necessary to show the sex scenes in detail to show all aspects of the girl's personality and that the display of sex in the movie would not be at all shocking to the average person; and Mr. Stephany's testimony that without the sex scenes the film would be destroyed. This expert testimony is in the record for this

Court to consider. By the nature of these proceedings, in the context of the three-pronged test, this Court is put in the position of judging anew the credibility of such statements. Appellee submits that these witnesses, in overzealous advocacy of freedom in the arts, have made assertions which are absurd and to which this Court should not give credence.

Witnesses such as Dr. Johnson start from the premise that freedom of expression in the arts is an absolute concept. Any opinion as to the merit of a particular movie must, therefore, necessarily be biased. Such so-called experts do not accept the holdings of this Court that pornography is not protected by the First Amendment. Appellee urges the Court to consider these elements in evaluating the testimony of some of Appellants' witnesses.[1]

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[1] Compare the testimony of the witnesses for the movie in the Boston case, *Commonwealth of Massachusetts v. Karalexis, et al.*, No. 43068/69/70/71 (Suffolk Superior Court), as noted by Judge Tauro in footnote 8 of his well-reasoned opinion:

> "In expanding upon their positions, some defense witnesses stated that sexual intercourse upon the stage by actors in a dramatic presentation would be acceptable; that no limitation should be placed upon explicit portrayals of deviant or normal sexual activity in films; that college students should not be prevented from producing films containing scenes of nudity, oral-genital contacts and, at least, simulated intercourse; that prurient sexual activity should be limited to those acts involving violence or lack of consent and that the area of legitimate state interest should be limited to protecting individuals from physical attack or unwanted intrusions on their privacy. One witness stated that if a detailed and brutal seduction scene from the constitutionally protected book, 'Fanny Hill', were portrayed in a film, it would be 'boring' and 'an extraordinarily dull scene' but should not be prohibited.
>
> "Several defense witnesses testified that exhibition of 'I Am Curious (Yellow)' to minors should not be proscribed. One held that college students should not be prohibited from making films containing explicit sexual scenes, including fornication. Another advocated sexual experimentation of the sort indulged in by Lena. She maintained that the universal practice of free

Another factor to consider in evaluating their testimony is the observation in the opinion of Judge Carter in the court below that the witnesses "were certainly adequate to testify as to the opinion and thinking of persons of such high intellectual standards, but I am not certain that they were aware of the attitude of the average person with respect to the problems involved in this case." For instance, Dr. Rossi characterized himself as an average person, for purposes of applying the prevailing standards to this movie; Appellee submits that a college professor is not the average person envisioned by *Roth*.

The respective witnesses were asked whether they would let their younger children see the movie. The representative responses were that the 13- and 15-year-old children of the witnesses would be permitted to see the movie. Appellee urges that it is obvious that this would not be the reaction of the average person. Witnesses for the Appellants were asked generally about the effects upon young people seeing the movie. The State does not contend, and has not contended at any time during these proceedings, that a movie should be censored merely because it would be offensive to minors. Any argument along these lines was put finally to rest by this Court in *Butler v. Michigan*, 352 U.S. 380, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957). The testimony in this respect is important, however, because it establishes at the very least the offensive elements of the movie. When a witness says the movie should not be seen by someone under eighteen, but that

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love both before and after marriage would benefit society even if it resulted in 'illegitimate children'.

"It was contended that not even the inclusion of the rankest porongraphy could affect the film's social value. It was also conceded that the gradual acceleration of sexual explicitness in films could lead to widespread vulgarity, an undesirable consequence for American life and a reflection of the staleness of Swedish life."

it may be seen by someone over that age, his reasons for the distinction require explanation.

Appellant, in the proceedings before the Maryland Court of Appeals in a footnote to their brief, objected to a statement in Judge Lumbard's dissent in the 2nd Circuit case, *United States v. A Motion Picture Entitled "I Am Curious Yellow", supra.* They have elected to ignore that issue in these proceedings, but Appellee feels that this Court should be apprised of it as bearing on the serious artistic intent of the director and Grove Press. Judge Lumbard's statement was:

> "The excerpts from the director's diary which were published in Sweden emphasize sex and the breaking away from old cliches about sex. The diary makes no mention whatever of any of the aspects of the film which it is claimed give it redeeming social value — the class structure in Sweden, ideas of non-violence and the like."

Judge Lumbard's reference is to two excerpts from the diary introduced into evidence by the government. The evidence in the federal case was that these two extracts from the diary were the two which the director had translated initially for promotional use in distributing the film. It was also established that they were given to Barney Rosset, the president of Grove Press, for use in promoting the movie. The two extracts contain exclusively the portions of the diary that deal with the sexual aspects of the movie — they make no reference to anything in the movie except the development of the sexual theme. This evidence is very enlightening as to what emphasis this "serious" director put on the film, as Judge Lumbard noted. This evidence supports the conclusion that the claims of value now made for the film are spurious, and that the nonsexual portions of the film — the man-in-the-street interviews, picketing, political discussions and non-violent exercises —

are window-dressing, a vehicle for presenting the scenes of sexual conduct and nudity. The government, in introducing extracts from the diary was not, as intimated by Appellants, unfairly emphasizing the sexual aspects of the diary, but rather it was bringing to the Court's attention the emphasis placed on these aspects by the director and distributor, and the use of the sex in the movie in its promotion.

Before leaving the issue of obscenity of the film under the three-pronged test, it should be noted that the Bench has perforce acquired and developed expertise in the field of obscenity by virtue of the exercise of an independent exercise of constitutional judgment at each level. Appellee would sum up its argument under the *Memoirs* standards by quoting several judicial opinions regarding "I Am Curious (Yellow)". Judge Thomas F. Murphy, in the federal customs case, ruling on the motion of Grove Press for summary judgment, stated:

> "The film was exhibited to me on April 10, 1968. To me it was repulsive and revolting, the sexual scenes having no relationship to the story line or plot — if there was one. These sexual scenes ranged from copulating in a tree; copulating astride a balustrade of a public building and in the nude in a room; with other scenes of buggery, cunnilinction and fellatio, all in the nude. The final scene, in conformity to the dominant theme, shows the female lead performing an orchiectomy or peotomy or both on her murdered lover with a kitchen carving knife.
>
> "If the film has a message, whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hard core pornography. *Cf. Landau v. Fording, ... [supra].* In my opinion, the average person applying community standards would find that the dominant theme taken as a

whole, appeals to prurient interest, is insulting to the American public and is devoid of social value. . . ."

United States v. A Movie Entitled "I Am Curious (Yellow)" 285 F. Supp. 465, 472 (1968).

Judge Lumbard, in his dissent in the 2nd Circuit, stated:

"Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

"While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest. Nor is it persuasive that the explicit sex scenes take only about 10 minutes out of 120. The enormous visual impact of a motion picture as distinguished from other media cannot be disregarded. *Cf., Freedman v. Maryland*, 380 U.S. 51, 61, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). The combination of sight and sound, in the darkness of the movie theater, result in a uniquely forceful impact on the audience. Because of the nature of this medium, sexual scenes in a motion picture may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine."

Appellants' bland assertion that the film is plainly not obscene, applying the three-pronged test, is easily refuted. The film was found to be obscene by a jury in the United States District Court for the Southern District of New York. It was found to be obscene in an in depth, well-

reasoned opinion by Judge G. Joseph Tauro, Chief Justice of the Superior Court in Boston. It was found to be obscene by Judge Herbert W. Walton in a State court proceeding in Johnson County, Kansas; by Judge John H. Lucas in a State court proceeding in Kansas City, Missouri; by Judge John J. Lally in a State court proceeding in Spokane, Washington; and by Judge Paul LaPrade in a State court proceeding in Maricopa County, Arizona. It was found to be obscene by a three-judge Federal court in the United States District Court for the District of Kansas. It was found to be obscene by a Maryland trial court and the Court of Appeals of Maryland. The foregoing list is not exhaustive.

These judicial findings of obscenity are supported by well-reasoned opinions, and we incorporate them by reference into this brief. It must be noted that each of the judicial findings of obscenity was made by applying the three tests enunciated by Mr. Justice Brennan in *Memoirs*. This is one of the most stringent of the varying tests for obscenity which some members of the Court have enunciated, and it is not at all clear that it is the proper test to be applied, particularly to motion pictures.

II.

THE FILM IS OBSCENE UNDER THE TEST ENUNCIATED BY MR. JUSTICE HARLAN, MR. JUSTICE BLACKMUN, AND MR. CHIEF JUSTICE BURGER.

Mr. Justice Harlan set forth a well-reasoned test for obscenity in *Roth v. United States*, *supra*, which he has consistently followed in subsequent obscenity litigation. See *Roth*, *supra*, at 496; *Manual Enterprises v. Day*, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432 (1962); *Jacobellis v. Ohio*, *supra*, at 203; *Memoirs v. Massachusetts*, *supra*, at 455; *Interstate Circuit v. Dallas*, 390 U.S. 676, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968). This view is essentially that all

material is constitutionally protected at the federal level except hard core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it treats sex in a fundamentally offensive matter under rationally established criteria for judging such material. As Mr. Justice Harlan said in *Memoirs, supra*, at 458, is:

> "From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury consider such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions."

The rationale supporting this view has been eloquently restated by Mr. Justice Harlan in each of the cited cases and is well known to the members of this Court. No useful purpose can be served by paraphrasing Mr. Justice Harlan's opinion in this respect. We urge, that Mr. Justice Harlan's approach to this issue of obscenity is a constitutionally sound approach and should be adopted by at least a majority of the Court. Chief Justice Burger's opinions in *Cain v. Kentucky*, No. 347, Oct. Term, 1969, decided March 23, 1970, U.S. , 25 L. Ed. 2d 334, 90 S. Ct. 1110; *Carlos v. New York*, No. 524, Oct. Term, 1969, decided December 8, 1969, U.S. , 24 L. Ed. 2d 303, 90 S. Ct. 395; and *Walker v. Ohio*, No. 1470, Oct. Term, 1969, decided June 15, 1970, U.S. , 26 L. Ed. 2d 385, 90 S. Ct. 1884, and Mr. Justice Blackmun's opinion in *Hoyt v. Minnesota*, No. 1544, Oct. Term, 1969, decided June 29, 1970, 26 L. Ed. 2d 782, 90 S. Ct. 2241 evidence a concurrence in Mr. Justice Harlan's position, and hopefully indicates that the Court is moving toward acceptance of this position.

Appellants argue that this test cannot be applied for two reasons (1) the Maryland Court did not apply local standards, and (2) the test is inappropriate for nationally distributed materials. The testimony of Mr. Forshaw and Mr. Lewin, the State's witnesses, and the only witnesses who testified on the issue of community standards, was to the effect that the movie was patently offensive in its depiction of sex as measured by both national and local standards. The lower court and the Maryland Court of Appeals found that the movie satisfied this independent *Memoirs* test of obscenity without delineating whether a national or local standard was the measure. The Court did not find it necessary to differentiate between the two and the finding must therefore, by necessity, encompass both. Even if the finding were limited to national standards this would lend no substance to Appellant's argument; Mr. Justice Harlan requires only that rational criteria be used and the imposition of either a national or local standard would satisfy this requirement. Appellants' second argument for rejection of the test flies in the face of the fact that Mr. Justice Harlan, Mr. Justice Blackmun, and Mr. Chief Justice Burger have adopted it specifically in the context of nationally distributed motion pictures.

What is the result of applying Mr. Justice Harlan's criteria to the instant case? This case comes on appeal to this Court from a State court. The Maryland Court of Appeals affirmed the decision of a trial court which had affirmed the administrative decision of the Maryland Motion Picture Censor Board that the subject film is obscene. Accordingly, the issue is (1) whether in the State proceedings rational criteria were employed in judging the obscenity of the movie, and (2) whether there is reasonable evidence in the record to support the State's findings; or as stated by Mr. Justice Harlan in *Interstate Circuit v.*

Dallas, supra, at 748, is this an instance "where the state action clearly appears to be but the product of prudish overzealousness".

The criteria employed at the State level in the determination of the obscenity issue was the three-pronged test of *Memoirs, supra*. Mr. Justice Harlan has not required that such a stringent test be imposed by the states; but in imposing this stringent test, Maryland has more than satisfied the minimum requirement for State regulation of obscenity.

The Appellee urges that the record before this Court contains ample evidence to support the Maryland Court of Appeals' conclusion that the film is obscene so as to satisfy the reasonable evidence requirement, Mr. Justice Harlan's other "test" on review.

III.

THE FILM IS OBSCENE UNDER THE TEST ENUNCIATED BY MR. CHIEF JUSTICE WARREN.

Chief Justice Warren joined with Mr. Justice Brennan in his controversial opinion in *Memoirs, supra*, which has acted to expand the prurient interest test of *Roth* to the three-pronged test enunciated there. An important distinction, however, is present in Chief Justice Warren's approach to the obscenity issue. He held that Supreme Court review should be limited to the record and should not involve an independent *de novo* judgment on the question of obscenity. In *Jacobellis v. Ohio, supra*, at 202-203, he stated:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: Material is obscene and not constitutionally protected against regulation and proscription if 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. I would commit

the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene. *Cf. Thompson v. City of Louisville*, 362 U.S. 199. But since a mere modicum of evidence may satisfy a 'no evidence' standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent *de novo* judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a 'sufficient evidence' standard of review — requiring something more than merely any evidence but something less than 'substantial evidence on the record [including the allegedly obscene material] as a whole.' *Cf. Universal Camera Corp. v. Labor Board*, 340 U.S. 474. This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation."

This test requiring "sufficient evidence" is met in this case. The trial court viewed the film, heard numerous experts on both sides of the obscenity issue, and reached a conclusion based on the viewing and his assessment as to the credibility of the witnesses and the weight that should be accorded to their testimony. The substantial evidence which more than supports his finding of obscenity is: first and foremost, the movie itself with its perverse dis-

play of, and emphasis upon, explicit sexual activity; and secondly, the supporting testimony of the State's witnesses to the effect that the movie amply satisfied each element of the *Memoirs* test for obscenity — the judge evidently gave credence to this testimony as opposed to that offered by the film's advocates.

The Court of Appeals undertook a *de novo* review of the evidence in arriving at its conclusion as to the film's obscenity. That Court viewed the film and analyzed the testimony, not with the idea of reviewing the lower court's findings in accordance with the "sufficient" evidence theory, but rather in accordance with Mr. Justice Brennan's dictate to make an independent constitutional judgment on the facts of the case, that is, all the evidence in the case. *Jacobellis v. Ohio, supra*, at 190. The majority of the Court of Appeals found the movie to be obscene.

Pursuant to the Warren theory of review, the Maryland Court of Appeals need not have made an independent judgment. The fact that they did makes the State's case stronger as to the application of the "sufficient" evidence formula. All evidence, considered *de novo*, convinced the majority of the Court of Appeals that the movie is obscene. Under the Warren theory of review, this Court need only consider the State's evidence and the allegedly obscene material. If these, considered together, amount to "sufficient" evidence, affirmance is in order. Appellee submits that the "sufficient" evidence test is clearly satisfied here.

It is respectfully urged that if the Warren theory of review had been employed by the Maryland Court of Appeals, there would have been a unanimous affirmance of the lower court. The Warren approach has much to recommend it. If there has been full consideration of the obscenity issue by a State court, applying the proper standards,

this Court ought not to assume the role of a trial court and make independent findings as to the credibility and weight of testimony of the witnesses who testified at the trial? Surely the movie may be seen, as suggested by Chief Justice Warren, but need the testimony of each witness in the record be read by each Justice so that he can form an independent subjective judgment? Why are the states not to be trusted in this area? Why should this Court be the "Super Censor of all the obscenity purveyed throughout the Nation?" If there is "sufficient evidence" in the record to support the State court finding, it should be affirmed.

IV.

THE FILM IS OBSCENE UNDER THE *ROTH* TEST AS DEFINED BY MR. JUSTICE WHITE AND MR. JUSTICE CLARK.

Mr. Justice White and Mr. Justice Clark noted in separate dissents in *Memoirs v. Massachusetts, supra*, that the *Roth* test as originally enunciated is controlling and that the imposition of an independent social value test as proposed in Mr. Justice Brennan's opinion, is not proper. They noted that "social importance" is not an independent test of obscenity, but is relevant only to determining the prurient appeal of the material.

Among the courts which have been called upon to decide whether "I Am Curious (Yellow)" is an obscene film it has been adjudged not obscene only upon a finding that the film cannot be said to be "utterly without redeeming social value". The 2nd Circuit reversal in *United States v. A Motion Picture Entitled "I Am Curious (Yellow)", supra*, was by a two-to-one vote. Judge Friendly, in concurring, noted that if he were to be persuaded that the *Roth* standard without an independent social value test was the controlling law, he would hold the film to be obscene. The author of the dissenting opinion (two judges concurring)

in the Maryland Court of Appeals stated as his reason for holding the film not to be obscene: "Because I think this film is not *'utterly* without redeeming social value', I would (reluctantly and with regret) reverse the court below." The dissenting judges stated their understanding of the law to be that "a motion picture will be constitutionally protected if there is a mere *presence* of matters of social importance even though the matter may, in fact, be outweighed by the film's prurient appeal" (emphasis included in original). The trial judge in the New Jersey case, cited in Appendix A of Appellants' Reply Memorandum to Appellee's Motion to Dismiss or Affirm, applied the three tests independently and found the film to be obscene under the first two criteria, but found it to be not obscene because he felt that the social value test applied independently established a "modicum of social value".

The independent application of the social value test is the crutch Appellants have used and continue to use to foist this obscene picture on the American public. The 2nd Circuit's division of opinion on this issue opened the latch for the dissemination of the film. We argued, and the Court of Appeals of Maryland held, that the movie was obscene under the three-pronged test applied independently. There can be little question but that the film is even more conclusively obscene if the "social value" test is not applied independently as Mr. Justice White and Mr. Justice Clark stated it should not be.

V.

THE FILM IS OBSCENE UNDER THE HARD CORE PORNOGRAPHY TEST OF MR. JUSTICE STEWART AND UNDER MR. JUSTICE BLACK'S ABSOLUTE CONCEPT OF THE FIRST AMENDMENT.

Mr. Justice Stewart noted in *Jacobellis v. Ohio, supra,* at 197, that all material is constitutionally protected at both the federal and state level except hard core pornography. His definition of hard core pornography at that time was:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." In his dissent in *Ginzburg v. United States*, *supra*, at 499, Mr. Justice Stewart borrowed the following description from the Solicitor General's brief to indicate what may be considered hard core pornography. This was the definition:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . .".

Another definition particularly appropriate in this context is the description of the types of material constituting hard core pornography in the Solicitor General's brief in the *Roth* case, Brief for the United States, pp. 37-38, *Roth v. United States*, *supra*.

> "The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer can-

> not easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Mr. Justice Harlan, in *Memoirs, supra,* at 457, defined hard core pornography as "that prurient material that is patently offensive or whose indecency is self-demonstrating."

There can be little doubt that the run of the mill stag film is hard core pornography under any of the tests. What then is the effect of having stag film sequences liberally interspersed throughout an otherwise innocuous movie? Explicit scenes of male and female copulation in a variety of positions and locales, with genitals fully exposed and vivid portrayals of cunnilingus, sodomy, and fellatio cannot lose their character as hard core pornography. The fact that they are interspersed throughout the movie heightens their effect rather than diminishes it. This is cogently set forth in Chief Judge Lumbard's opinion in the 2nd Circuit:

> "The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge."

If the subject film is not deemed hard core pornography, the onus of legal obscenity may be erased from the vilest stag film by simply including a redemptive device or two. "I Am Curious (Yellow)" is a far cry from "The Lovers" which evoked the response that "I know it [hard core pornography] when I see it, and the motion picture involved in this case is not that." "I Am Curious (Yellow)" squarely presents the question whether hard core pornography, with a little window dressing, is to be protected as free speech or is to be rejected in accordance with *Roth* as obscenity "not within the area of constitution-

ally protected speech or press." Appellee submits that the concept of hard core pornography as set forth in prior opinions of this Court does encompass this movie; but if we are mistaken in this premise, we ask that consideration be given to expanding the concept in order that *Roth's* holding excluding obscenity may be given substance.

We cannot leave the issue of obscenity *vel non* without at least an effort to convince Mr. Justice Black that the movie is obscene, even within the context of his absolute concept of the First Amendment. We are not unaware that Mr. Justice Black joined in with Mr. Justice Douglas in a concurring opinion in *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965), to the effect that "movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression", but we ask that this statement be reviewed in the light of his statement in the *Roth* dissent, that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." It can be assumed that this exception would encompass suppression of an actual act of fellatio performed by live participants on a theater stage as being violative of a state perverted practice statute. Why can't the exception also cover such an act performed on the motion picture screen? This conduct concept as applied to movies is discussed, *infra*, and we only ask that Mr. Justice Black give it fair consideration in the context of this movie with its vivid portrayal of numerous and varied sexual encounters.

VI.

THE THREE-PRONGED TEST IS NOT THE PROPER TEST FOR JUDGING OBSCENITY IN ANY MEDIA.

In recent obscenity decisions, lower courts, including the Maryland Court of Appeals (and the Maryland Motion Picture Censor Board), have proceeded on the assumption

that the *Roth* test of 1957 has been "modified" since it was originally handed down. They read the law as requiring:

(1) that the dominant theme of the material, taken as a whole, must appeal to the prurient interest in sex of the average person;

(2) that the material must be "patently offensive" by contemporary community standards;

(3) that the material must be "utterly without redeeming social value".

But should such assumption be made? The *Roth* case was the only one where a majority of this Court agreed on any test; and in that case, the Court said:

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas . . . having even the slightest redeeming social importance have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire*. . . . 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Supreme Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The Court then set out what has been referred to as the *Roth* test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest".

When and in what manner did the other two tests, i.e., (a) material must be "patently offensive" and (b) it must be "utterly without redeeming social value" purportedly come into the law?

The "patently offensive test" came from the opinion of Mr. Justice Harlan in *Manual Enterprises v. Day, supra.* This "test", however, only received the concurrence of Mr. Justice Stewart in that case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons, and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan. Mr. Justice Black concurred in the result without opinion; Mr. Justice Clark dissented and filed a dissenting opinion. Mr. Justice White and Mr. Justice Frankfurter took no part in the decision. A review of subsequent cases does not indicate that a majority of the Supreme Court has committed itself in any one case to the "patently offensive" test. Hence, the doctrine of *stare decisis* does not commit the Supreme Court to the "patently offensive" test.

The "*utterly* without redeeming social value test" (emphasis supplied) as applied to motion pictures apparently came from the opinion of Mr. Justice Brennan in *Jacobellis v. Ohio, supra,* involving the French motion picture "Les Amants" ("The Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion, Messrs. Justices Black, Douglas, White, and Stewart, concerning in the judgment only. Mr. Justice Harlan dissented, as did Mr. Chief Justice Warren and Mr. Justice Clark, so that this "test" did not receive the approval of a majority of the Supreme Court.

The third "test" was introduced into the law by the decision in *Memoirs, supra,* in 1966. But again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, Mr. Justice White and Mr. Justice Harlan, in separate dissenting opinions in *Memoirs* observed that the social value test was "novel" and that only *three* members of the Supreme Court held to it. They further pointed out that such a test *rejects* the *Roth* test to which, as above indicated, a *majority* of the Supreme Court *did agree.*

Even in the case of *Redrup v. New York,* 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), the *per curiam* opinion of this Court was careful to state that the necessity of meeting the three-point test was a view held *only* by certain justices in *Memoirs. Redrup* did not cite the three-point test as the test of the Supreme Court.

The Court's holding in *Roth* that obscenity is not protected by the First Amendment because it is "utterly without redeeming social importance" has been rendered ineffective by the three-pronged test which would give license to any material with a modicum of social value. Certainly any material with minimal social value is not automatically imbued with social importance.

Appellees submits that "social value" is not the correct standard, but rather that "social importance" should be the measure. Appellee further submits that the issue whether there is "social importance" is not an independent test of obscenity, but is relevant only in determining the predominant prurient interest of the material. The minority opinion of Mr. Justice Brennan in *Memoirs* has somehow been generally accepted as setting forth the con-

trolling rule of obscenity both as to books and movies. This is the wrong test to judge the obscenity of any material, as has been noted by pursuasive authority. Judge Tauro in the *Karalexis* case, *supra*,[2] Judge Barnes in his concurring opinion in the court below, and the Kentucky Supreme Court in *Cain v. Kentucky*, 437 S.W. 2d 769 (1969), reversed on other grounds by this Court in No. 347, October Term, 1969, have held that the *Roth* test without its subsequent extensions by a minority of the Court is the only proper and controlling test for judging obscenity.

VII.

IF THE MEMOIRS TEST IS AT ALL APPLICABLE IT SHOULD BE LIMITED TO BOOKS, AND DIFFERENT STANDARDS OF OBSCENITY SHOULD BE APPLIED TO MOTION PICTURES.

Even if we are to accept the standard of *Memoirs* with its independent "utterly without socially redeeming value" test, it does not follow that this test should be applied to motion pictures. The test was enunciated in a case involving books, and if it is at all valid, it should only apply to books. Therefore, if the Court were to apply the three-pronged test of *Memoirs* and arrive at the conclusion that the film is not constitutionally obscene under these standards, it should take into consideration whether these standards, especially the "utterly without socially redeeming value" test, are properly applicable to motion pictures.[3]

This Court and numerous other courts have noted a difference between movies and novels in the obscenity context.

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[2] Judge Tauro also pointed out in detail the inherent contradiction in the independent application of an independent "utterly without socially redeeming value" test.

[3] For an excellent discussion justifying the application of a different standard to motion pictures see Randall, "Censorship Of The Movies", University of Wisconsin Press, (1968) pp. 66-70.

As early as 1952, when this Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("The Miracle") in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952), Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, JJ., concurring; there were no dissents) noted the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (343 U.S. at 502-503, 72 S. Ct. at 781, 96 L. Ed. at 1106).

Mr. Justice Clark, in his concurring opinion in *Kingsley Pictures Corp. v. Regents* ("Lady Chatterley's Lover"), 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959), stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'." (Emphasis in original).

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman v. Maryland, supra:*

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Judge Hays in the 2nd Circuit case involving the film in this case, in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books" (404 F. 2d at 198).

In the state courts, the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau v. Fording, supra*, the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland, supra*). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal. L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J. supra, at p. 708).
>
> "Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." Id. at 181.

This statement by the California Appellee Court is given added significance by the fact that the obscenity finding

in *Landau* was affirmed by this Court. Further recognition of the difference between motion pictures and books as far as obscenity is concerned is reflected in the majority and concurring opinions below.

It is also most interesting to note the position the Appellant, G. P. Putnam's Sons, took as to this issue in the *Memoirs* case. That position, as set forth in their brief, was that the "social value" test should be limited to books. The argument was repeated and explained in a recent book by Charles Rembar, counsel who represented G. P. Putnam's Sons in *Memoirs*. He was counsel for the Appellant here, Grove Press, in litigation concerning the books, "Lady Chatterley's Lover" and "Tropic of Cancer". The book entitled "The End of Obscenity" was published in 1968 by Random House. Mr. Rembar, on pages 436 through 441, presents a strong argument for limiting the "social value" test to books — an argument which conceivably induced certain members of this Court to adopt social value as an independent test. This argument of the lawyer for Grove Press, representing G. P. Putnam's Sons in *Memoirs*, has significance in the case at bar and should be brought to the Court's attention:

> "The final problem in writing the brief (save one that I will discuss in a later chapter because my decision was not to deal with it in the brief at all) was not raised either by the court below or by our opponents. It had to do with whether the value test could operate in all situations and for all forms of expression. Up to this point I had never spoken of possible exceptions, nor did the language of *Roth* on which we relied suggest any. Though the problem had been on my mind, it was not something that I had thought it necessary, or desirable, to discuss. But now, I felt, it had to be dealt with, to some extent at least; the Supreme Court might be undertaking a fundamental review of the law, and nine agile intellects would be ranging over the field of obscenity.

"The value test had a valid conceptual basis in the First Amendment and a valid precedential basis in *Roth*, and it worked well — made practical sense — in the cases where we had sought to apply it. Yet one could conceive of situations where, though the test by its terms might seem to invoke the guaranty, the Court would certainly approve suppression. Let us assume a play in which an act of sex is performed (performed, not suggested). Let us also assume the play has dramatic merit. To make the point plain, let us finally assume it is broadcast on network television. (The reader may make his own choice of the particular variety of sexual act, and of whether the broadcast would be in black-and-white or living color.)

"I did not want to undertake a specific discussion of hypotheticals such as this. My opponents in the various cases had not brought them up. They did not argue that the value theory should be rejected because in some areas it was unworkable. Rather, they urged that *Memoirs* itself failed the value test (as the attorney general contended), or that there was no such thing as a value test (as the Citizens for Decent Literature were to contend). It would hardly be wise to spell out an argument against our position that our opponents were not making. Nevertheless, either during the hearing or in the Justices' private thinking, horror examples might come into their deliberations. I wanted to suggest a solution without posing the problem.

"There were two things in the brief that I hoped would serve the purpose. One was the distinction between expression and conduct. The imaginary television show I described involves performance and public audiences. It may be true that the performers have something to communicate, and that to this extent expression would be silenced, but the situation may fairly be regarded as in its essence action. The Court had sanctioned the impairment of communication where elements of action were present; it had, for example, approved restrictions on parades, and on

the use of 'loud and raucous' sound trucks, and on salesmen calling without invitation. A defendant charged with indecent exposure — in the streets, not on the stage — might also argue that his effort is to communicate, and no doubt it is.

"Having drawn on the distinction between expression and conduct, I then suggested that another kind of distinction might be appropriate — among different forms of expression. Again, I did not offer it as a reply to something said on the other side, but rather as an affirmative part of our own argument, an additional reason for giving new freedom to writers. The final paragraphs of the brief were these:

> 'It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.
>
> 'The audience for a book is the individual reader, not an assembled group. In a theater audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems. (The familiar hypothetical from another area of restraint — shouting "Fire!" in a theater — would hardly present a problem if there were only one other person in the theater.) Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication — the sound truck, for example, or the advertising poster in a train or bus — make us their captive. Television, the great new medium of our time, presents both aspects:

its communications are usually received in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

'There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

'At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

'Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

'Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value — "literary or scientific or artistic." The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that in a case where value is proven, a book may not be destroyed. That is the case before the Court.'

"If the television example and other *casus horribiles* should occur to Justices, these paragraphs would serve as a reminder that they involve modes of communication other than books. If one of the insupportable hypotheticals should someday become real, the Court could distinguish its *Fanny Hill* decision (assuming it was a decision in our favor) on the ground that the uncompromising social-value test had gained acceptance in a case that involved a book.

"There was no precedent for separating media of expression but neither was there precedent that stood in the way. The Court had declared motion pictures protected by the First Amendment, but whatever statements had been made by individual Justices, the Court had not ruled — there had been no case presenting the question — that motion pictures are entitled to protection in the same way or to the same extent as books. Nor does it follow. It would not follow even from Black's absolute view of the First Amendment. Black's premise is that the Amendment is to be taken literally. The Amendment states, the reader will recall, that 'Congress shall make no law . . . abridging

the freedom of speech, or of the press . . .' Black's appealing argument is that 'no law abridging' means 'no law abridging'. The majority's answer to Black, that the First Amendment had never been construed to confer an unlimited freedom, had behind it massive authority and little logic; it represented a conclusion, not a reason.

"But there is another answer where the books are not involved, one that Black might accept. If the Amendment is to be given a literal reading, then it may be said that films, and other art forms that are not entirely verbal, are not literally speech or the press. On the other hand, once 'speech' and 'the press' are expanded beyond their plain meanings, we are not reading the amendment literally; if that is the way the game of interpretation is to be played, then a converse liberty may justly be taken with the word 'abridging'. The Amendment's prohibition against law-making need not be imposed strictly where what the law affects is not strictly speech or the press.

"The extreme situations could thus be accounted for, whether the First Amendment is to be given a literal construction or the traditional loose construction. Two members of the Court subscribed to the literal construction, and of the others, there were three or four who I hoped would accept the value test; the two groups taken together would make a majority. It was that majority for whom, if they should be troubled by cases not present but envisioned, it was necessary to provide solutions.

"I was of course not interested in suggesting candidates for censorship. But I was speaking to a Court which, as I saw it, had not the slightest idea of granting complete freedom for everything that might be called expression. I was saying that situations for which it might think anti-obscenity laws altogether fitting were different from ours; the precedent the Justices would set by ruling in our favor, need not in future cases haunt them. Remote regions of constitutional law did not have to be mapped in detail. It was

> enough to point out that distinctions among modes of communication were permissible, that the Court's opinion need not state a single rule for all of them, and that the printed word was entitled to the greatest freedom. What the attorney general had proceeded against was the printed word."

The thrust of the cited argument is that the independent social value test is peculiarly applicable to books, and is not an appropriate gauge for stage shows or movies. Some members of this Court accepted the test in this context. Now Appellants here would ask this Court to forget the argument in *Memoirs* that the "social value" test be limited to books. The patent contradiction of this approach brands it as devoid of merit.

Appellee submits that "I Am Curious (Yellow)" is one of the *casus horribiles* referred to by Mr. Rembar. It is one of the "unsupportable hypotheticals" that has "someday become real". Appellee would accordingly urge that Mr. Rembar's suggestion be adopted and the "uncompromising social value test", if it is to be considered at all applicable, be distinguished on the ground that it "had gained acceptance in a case that involved a book."

This Court's recognition that movies warrant different treatment than books was again emphasized in the eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967. In each case the Court granted certiorari and summarily reversed an obscenity conviction citing *Redrup* as its sole authority. Three of the cases involved films: *Cobert v. New York*, 388 U.S. 443, 18 L. Ed. 2d 1305, 87 S. Ct. 2092; *Ratner v. California*, 388 U.S. 442, 18 L. Ed. 2d 1304, 87 S. Ct. 2092; *Schackman v. California*, 388 U.S. 454, 18 L. Ed. 2d 1316, 87 S. Ct. 2107; while the others involved books. Justices Brennan and Warren singled out the three cases involving motion pictures, and

voted to affirm the convictions in those cases. Justice Clark voted to affirm the three convictions involving movies, as well as several of the convictions involving books.

Another strong argument that there should be a different test for obscenity in commercially distributed motion pictures is suggested by this Court's opinion in *Redrup v. New York, supra.* The Court indicated that if there is an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, this could be determinative on the obscenity issue.

The constitutional justification for this right of privacy *vis a vis* the First Amendment and a strong argument for recognizing the right in the obscenity context is set forth by Charles Rembar in "The End of Obscenity", *supra,* pp. 500-502. Mr. Rembar's thesis is that the right of privacy is not violated when one reads a salacious novel, but it is violated when one is exposed to obscenity in public places.

The motion picture theater is a public place to which an individual is entitled to go. He has a reasonable right of privacy in a public place. *Cf., Public Utilities Commission v. Pollack,* 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct. 813 (1952), just as he has a more absolute right in private places; *Cf., Breard v. Alexandria,* 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1950); *Stanley v. Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969).

The publication which constitutes the assault upon individual privacy in the motion picture media does not come until the individual is subjected to the actual scene on the movie screen. Before that exact moment, the individual can have no knowledge of the offensive affront to his sensibilities. Grove Press avers in its brief that it has taken "full precautions . . . to advise the public of

the nature of the film (without, of course, engaging in an 'pandering')".[1] They refer to movie theaters as "'controlled' locations which are private in the sense that no unwilling person is required to see the allegedly obscene material." It is a *non sequitur* to say that the public can be advised as to the nature of the intrusion on their privacy without the pandering of the offensive material by the distributor — Grove Press certainly has done nothing to advise a prospective audience that they are about to be exposed to explicit scenes of copulation, fellatio, cunnilingus, sodomy, castration, other than through pandering the sex in the scenario.

The determinative issue, therefore, is whether assault on the individual's privacy which occurs at the moment he sees the stag film sequence on the screen is "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it". Of course, he can shut his eyes, but this does not negate the invasion upon his privacy. He has been subjected to the embarrassment of being exposed in a public place to an indecent performance.

Pursuant to *Redrup v. New York*, *supra*, this invasion of privacy inherent in the presentation of an obscene movie warrants the imposition of less rigorous standards for judging obscenity, e.g., the classic *Roth* test rather than the three-pronged test of *Memoirs*.

The difference between films and writings having been recognized by the Court, and by the publisher in *Memoirs*

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[1] Grove also alleges that it has taken full precautions to exclude minors. The efficacy and very existence of these precautions is challenged by the findings by the District Court of Johnson County, Kansas, in *The State of Kansas v. A Motion Picture Entitled "I Am Curious — Yellow"*, No. 6122, Div. No. 1 (1969), as noted by Judge Barnes in his concurring opinion below.

what sense does it make merely to pay lip service to it? If this Court says movies are different and different standards should apply to them, then different standards should be formulated and applied. The only significant application of book standards to motion pictures occurred in *Jacobellis v. Ohio*, *supra*, but Appellee submits that the sexual content of the film in that case was so innocuous by present day standards that it would not have been found obscene under any standard and that the application to "The Lovers" of criteria applicable to books should not be conclusive as to motion pictures, generally, and "I Am Curious (Yellow)" in particular.

If not the three-pronged test of *Memoirs*, what test should be adopted to effectuate this Court's recognition of a difference between written material and movies? One suggestion with merits is that the *Roth* test without the extensions added to it by some Justices in later cases should be applied to movies. Appellee urges a return to the *Roth* test as to both writings and films, but if not to both, then at least as to motion pictures.

Another viable alternative is to give practical effect to Rembar's recognition of the distinction between expression and conduct.

Pursuant to this theory, a movie is more than speech; it has characteristics of conduct, and it is obscene if its affront to the average person is equivalent to that of obscene sexual conduct. Ever since the *Roth* definition of obscenity was formulated in 1957, commentators have pondered the problem that is now presented by "I Am Curious (Yellow)": whether the *Roth* definition (now the *Memoirs* test) would be an adequate measure of the obscenity of a motion picture film or theatrical play or

television show containing explicit scenes of sexual intercourse and other sex acts.

We submit that although "I Am Curious (Yellow)" is obscene under the *Memoirs* test, even that test does not appropriately measure the film's obscenity. A motion picture film which contains extended scenes of intimate sexual conduct in explicit detail should be judged obscene if it affronts the average person in the same way and to the same extent as does obscene sexual conduct. "I Am Curious (Yellow)" is obscene because it does so affront the average person.

The reasons which justify the illegality of obscene sexual conduct — e.g., conduct such as indecent exposure, public nudity and sexual intercourse in public — support this test of obscenity.

Obscene sexual conduct is illegal because it affronts others. See, for example, the Model Penal Code which penalizes "any lewd act which [the actor] . . . knows is likely to be observed by others who would be affronted or alarmed", discussed in Schwartz, *Morals Offenses and the Model Penal Code*, 63 Colum. L. Rev. 669, 674-675 (1963). "Lewd or indecent behavior is punishable in all jurisdictions. The prohibited conduct amounts to gross flouting of community standards in respect to sexuality or nudity in public."[5] "I Am Curious (Yellow)" similarly amounts to a gross flouting of such community standards, and for that reason, and for that reason alone, can properly be adjudged obscene.

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[5] A.L.I. Model Penal Code, Tentative Draft No. 13, Comments to Sections 213.4 and 251.1, Indecent Exposure and Open Lewdness, p. 82 (1961).

In *Roth* itself, 354 U.S. at 512, Mr. Justice Douglas, dissenting, observed:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct" (Emphasis in original).

In *Kingsley Pictures Corp. v. Regents*, *supra*, 360 U.S. at 702, Mr. Justice Clark, concurring, stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films or those that 'portray *acts* of sexual immorality, perversion or lewdness'" (Emphasis in original).

In *Trans-Lux Dist. Corp. v. Board of Regents*, 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964), reversed *per curiam* 380 U.S. 259, 13 L. Ed. 2d 959, 85 S. Ct. 952 (1965) citing only *Freedman v. Maryland*, *supra*,[6] the New York Court of Appeals, in reviewing the film "A Stranger Knocks" which showed two scenes of sexual intercourse, held 4-3 that a different standard is to be employed in judging the obscenity of a movie with such a sexual display.

Judge Burke, writing the majority opinion, distinguished the film from films raising an issue of thematic obscenity, i.e., advocacy of a forbidden theme, such as the films that were at issue in *Commercial Pictures Corp. v. Regents*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) (advocacy

[6] It is fair to infer from the citation of *Freedman v. Maryland* that *Trans-Lux* was reversed because of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity. *See Times Film Corp. v. Chicago*, 390 U.S. 139 (1968), for a similar situation where the Court held a Chicago statute invalid under *Freedman v. Maryland*, noting that it had not considered the issue of obscenity, 390 U.S., n. 1 at 139.

of adultery) and *Joseph Burstyn, Inc. v. Wilson, supra,* (sacrilege).

Judge Burke reviewed the oft-drawn distinction between conduct and speech, and concluded that a film which presented sexual intercourse, real or simulated, was just as subject to regulation as similar conduct "if engaged in on the street".

Judge Burke recognized that there could be no broad theory of legal equivalence between real conduct and a filmed imitation. He then stated:

> "Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film."

Chief Judge Desmond, concurring, put the matter even more strongly.

Another possible test is suggested by the hard core pornography position of Mr. Justice Stewart, and the comment in the *per curiam* opinion in *Redrup v. New York, supra,* that the three-pronged test imposes a "not dissimilar standard". The Court's concern with hard core pornography should be given effect in the realm of films. We are not unmindful of the dictate of *Roth* that material must be considered as a whole, but if a different test is to be applied to movies, this rule may be in need of revision in the film context. The inclusion of one hard core stag film sequence of explicit copulation, cunnilingus, fellatio, etc. should be sufficient to render a film obscene,

If none of these suggested tests is acceptable to the Court, we submit that the Court should draft a new test that would adequately recognize the patent obscenity of "I Am Curious (Yellow)".

VIII.

THERE IS PANDERING OF THE SEX DEPICTED IN THE FILM

This Court in *Ginzburg v. United States, supra*, held that evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. Therefore, when pandering is an issue, material otherwise not obscene may be adjudged obscene because the purveyor has chosen to market the material as being salacious. In the case at issue, evidence of pandering was adduced at the trial court; but inasmuch as there was a finding of Constitutional obscenity, the Court did not have to reach the pandering question. Pandering was argued on appeal (Appellee's Brief, pp. 33-35), but for the same reason, the majority did not reach the issue. Judge Barnes, concurring, did reach the pandering issue and found Appellants culpable on that ground.

Ginzburg can be summed up by the following excerpt from the opinion:

> "This evidence [of advertising] was relevant in determining the ultimate question of 'obscenity' and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publica-

tions to those who are offended by such material and the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality — whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (pp. 470, 471)

Another statement of the Supreme Court in *Ginzburg* which is especially relevant in the context of "I Am Curious (Yellow)":

> "Petitioners' own expert agreed, correctly we think, that '[i]f the object [of the work] is material gain for the creator through an appeal to the sexual curiosity and appetite', the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government, to be an otherwise debatable conclusion." (p. 471)

The pandering of sex in "I Am Curious (Yellow)" is not through the same technique as that utilized by Mr. Ginzburg. Grove Press is a professional purveyor of pornography[7] and they are certainly not going to subject themselves to the *Ginzburg* doctrine by direct advertising of the sex in the movie. The pandering of the sexual as-

[7] See article in August 29, 1969, issue of *Life* Magazine, entitled "The Old Smut Peddler", which characterizes Grove Press' President, Barney Rosset, as a "smut peddler" and describes his commercial exploitation of sex in books and movies.

pects of the movie is, therefore, not quite so apparent, but it is there; and it is quite effective in accomplishing its purpose. It is devious, but striking in its emphasis on the sex.

Appellants argue that under a system of prior restraint, it is impossible to show pandering. Appellee submits that it is difficult, but not impossible, e.g., *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 254 A.2d 203 (1969). The pandering which is present here is in the scenario (Respondent's Exhibit No. 9) which is sold in conjunction with the movie. With prior censorship the movie has not yet been shown in Maryland. We are therefore precluded from proving that the book is sold in the lobby of the theater and newsstands are saturated with it while the movie is in town as is the case in other jurisdictions.[8] There is evidence, however, that supports the conclusion that the book is sold in conjunction with the movie, to promote the movie, and this is all that is necessary under *Ginzburg, supra*.

The pandering of the sexual aspects of the movie in the scenario is patent. The undue emphasis in the scenario on the sexual aspects of the movie is to pander the sex in the movie. The scenario, in emphasizing the sex in the movie, reveals its object as "material gain for the creator through an appeal to the sexual curiosity and appetite." *Ginzburg, supra*.

The book itself, and Appellants' own witness, Dr. Mackie, clearly prove the pandering of the sex in the movie by

[8] e.g. finding of Judge Herbert W. Walton in the case involving this movie in the District Court of Johnson County Kansas, No. 6122, Div. No. 1: "Copies of said paperback were offered for sale and were sold to the public in the lobby of the Kimo South Theater during the exhibition of the film".

virtue of the publication and dissemination of the scenario to promote the movie and arouse the curiosity as to its sexual content. Dr. Mackie had read the scenario — his testimony was that there was a larger proportion of photographs of the sexual scenes in the book than in the movie, and that someone looking at this book would be struck by the disproportion (J.A. 305-309). He also stated that the use of the series of stop action frames depicting the sexual scenes served to emphasize the sexual theme (J.A. 314). This is quite relevant, and determinative in and of itself, in the context of the cited *Ginzburg* holding that animation of sensual detail to give the publication a salacious cast constitutes an appeal to the sexual curiosity and appetite and mounts up to the proscribed pandering.

The Court has the book as an exhibit and its speaks for itself in its concentration on the sexual aspects of the movie. Some guidance is provided by the comments of the Attorney General (J.A. 306):

> "You have a book on the cover says 250 illustrations. If you count the illustrations in this book, you will find approximately 100 of the 250 have to do with sexual themes, out of the 250. That is 100 out of 250, which is forty percent of the total against six minutes of 120 minutes or 135 minutes of the film, and if you will look you will find that in a period of some — pages 89 to about 160, you have some 83 or 80 sexual pictures against 60 others, which is about a hundred and twenty-five percent, which indicates there is a very significance emphasis on the pornography we say is in the film in this book, . . ."

This pandering of the sex in the movie is generated solely by the profit motive. By concentrating on the sex in the book, Grove Press sells the book; and by selling the book, they sell the sex in the movie.

IX.

THE MARYLAND FILM LICENSING STATUTE IS CONSTITUTIONAL.

Appellants have attacked the Maryland censorship statute on five grounds. We will first proceed to discuss grounds A and E together. Appellants say:

> "A. The Maryland Statute Operates to Prevent the Exhibition of Films in Instances Where Such Exhibition Would be Constitutionally Protected."
>
> "E. The Licensing Requirement Is Absolute and Does Not Permit Even Nonobscene Films To Escape Prior Review."

The imposition of the blanket prior restraint over both obscene and non-obscene films inherent in the concept of prior censorship was held by this Court to be a valid exercise of state sovereignty in *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391 (1961). This holding was made more specific by this Court in *Freedman v. Maryland, supra*, wherein the Court noted as a specific holding that "the state may require advance submission of all films in order to proceed effectively to bar all showings of unprotected films . . .". Under the Maryland system of prior censorship, only obscene pictures are refused a license,[9] and this procedure is subject to the required judicial review. Films which are found to be non-obscene are granted a license with minimal delay. This Court's holding in *Stanley v. Georgia, supra*, does not affect the Board's jurisdiction in reviewing films for commercial distribution.

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[9] Amicus Curiae Brief of Motion Picture Associates of America, Inc. have incorrectly recited the history of litigation pursuant to the statute. Footnote 27 should be amended to reflect Censor Board victories in *Heacitt v. Maryland Board of Censors*, 254 Md. 179, 254 A. 2d 203 (1969) and *Heacitt v. Maryland Board of Censors*, 255 Md. 528, 258 A. 2d 217 (1969).

The argument that the Board's licensing discretion under the statute is overly broad has been considered by the Maryland Court of Appeals in *Sanza v. Maryland State Board of Censors*, 235 Md. 319, 226 A. 2d.317 (1967). We adopt its holding as our argument as to this contention (at 339-341):

> "The appellants contend also that the Act is unconstitutional in respect of its coverage; that an overly broad discretion is delegated to the Board as to the films which may be censored, in violation of the due process clause of the Fourteenth Amendment; . . . We find [this contention] to be without merit.
>
> "The argument that the Board's licensing discretion under the Act is overly broad rests on the assumption that the Act applies to films and views shown for non-commercial as well as commercial purposes. On this assumption, the appellants contend that a person exhibiting a home moving picture or a store selling a scenic slide would be required under the Act to submit the film or view to the Board for approval and licensing. However, we believe the assumption to be erroneous. While the definitions of 'film' and 'view' in Section 1 of the Act are not expressly restricted to films and views to be shown commercially for profit, such an interpretation, in our opinion, is the only one consistent with the legislative intent as expressed and implied in the Act as a whole.
>
> "For the constitutional reasons previously considered, a legislative enactment providing a system of pre-showing censorship, like a penal statute, is to be strictly construed. The definitions of the words 'film' and 'view' in Section 1 state that the words shall be construed to include what is 'usually' meant by the respective terms. This language of the Act, in our opinion, calls for construction, and when there is occasion for construction, the Court, in determining legislative intent, will consider not only the literal meaning of the words 'but their meaning and effect considered in the light of the setting, the objectives and pur-

poses of the enactment, and the consequences that may result from one meaning rather than another . . . with the real legislative intent prevailing over literal intent.' *Height v. State*, 225 Md. 251, 257, 170 A. 2d 212 (1961). '[T]he construction should be in harmony with the manifest intent of the act and should not lead to an absurdity.' *Gatewood v. State*, 244 Md. 609, 224 A. 2d 677, 682 (1966), and cases therein cited.

"Under a literal construction, the Act would mean, as the appellants argue it does mean, that a Baltimore department store could not sell a slide of the Washington Monument without first submitting the view to the Board for approval. The illustration itself is a *reductio ad absurdum* of the argument that the Act should be given the sweeping construction which alone could bring about such a result. Section 7 requires a certificate to be shown on each approved film that it has been 'Approved by the Maryland State Board of Censors'. We do not believe the Maryland Legislature could ever have intended that a *pater familias* could not show in his home a moving picture which he has taken of his children without first obtaining the Board's approval and then affixing the certificate to the film. Yet, literally construed, the Act would require such a procedure.

"In support of their contention that the Act must be given a broad interpretation as to its coverage, the appellants cite the language of Section 23. That Section reads in part as follows:

> 'This article shall not apply to any non-commercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning.'

The appellants argue that the Section does not exempt all noncommercial exhibitions of films or views, and that, therefore, all films and views not included in the exemption are covered. In our opinion, how-

ever, the exemption may well be taken to have been enacted so as to preclude the application of the Act to the showing of films or views for money if the money is collected by the designated non-profit organizations. So construed, the exemption is consistent with an interpretation of the Act which limits its application to films and views to be shown for an admission charge, except when shown by public associations or institutions which do not operate for profit.

"At the hearing below, a member of the Board testified that the Board has never applied the Act, to her knowledge, except in accordance with this interpretation. Consistent, long-continued, unvarying administrative construction of a statute will be given great weight. *State Roads Comm'n v. Jones*, 241 Md. 246, 256, 216 A. 2d 563 (1966), and cases therein cited. In this case, we find that the administrative construction has been in accord with the legislative intent."

Appellants also contend that:

"B. The Obscenity Standard of the Maryland Statute Is Patently Unconstitutional."

Appellants' second objection to the statute is that the obscenity standard of the Maryland statute is unconstitutional. The short answer to this is that the Maryland Court of Appeals has already held in *Sanza, supra*, that the Section 6 definition of obscenity is unconstitutional. The statute does contain a severability clause and the Court, in holding the definition of obscenity of Section 6 to be unconstitutional, held that the only standard of Section 6 which remains is that the Board shall disapprove such films "as are obscene". The Court recognized that the only proper standard for disapproval of a film was obscenity in a constitutional sense under the rules laid down by this Court. The only remaining standard of Section 6 after February 8, 1967 (the date of the Court of Appeals'

decision in *Sanza*), is the portion of Section 6 which states that the Board shall disapprove such films "as are obscene". This Court in *Roth* upheld federal and state statutes stated in such broad definitional terms. The statute as it now stands recognizes only obscenity as defined by this Court as grounds for the refusal to issue a license; the Board of Censors, in every case, applies only this Court's criteria in making its judgments, and it did so in the instant case; the proof at trial in review of its administrative determination is presented in accordance with these criteria, and was so presented in the instant case; the trial court applies these criteria, and the Court of Appeals of Maryland recognizes this Court's definition of obscenity as the only controlling criteria.

Appellants' reliance on *Aptheker v. Secretary of State*, 378 U.S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964) and *Zwickler v. Koota*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967) is misguided as these cases are readily distinguishable. After February 8, 1967, pursuant to the dictate of the Maryland Court of Appeals, the only standard which the Censor Board could employ is obscenity in a constitutional sense as defined by this Court. Appellants in attacking the definitional standard of Section 6(b) are attacking a standard which is no longer part of the Maryland law, having been found to be unconstitutional by the Court of Appeals. In both cases cited by Appellant, a subsisting, overly broad definitional standard in a statute was at issue and the Court said that it would not judicially rewrite the statute so as to give validity to the standards as applied to the facts then at issue. Section 6 of the Maryland statute was concededly overbroad prior to *Sanza, supra*. Sanza preceded the litigation in this case, and thus Sec. 6 was not overbroad when the Board of Censors rejected "I Am Curious (Yellow)."

The proper rule is stated by this Court in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). There, Mr. Justice Stewart, delivering the opinion of the Court, noted that the Supreme Court of Alabama "performed a remarkable job of plastic surgery" on the Birmingham ordinance providing for administrative issuance of permits which was unconstitutional on its face for overbreath. He characterized this as "a commendable effort to give the legislation 'a field of operation within constitutional limits'." For purposes of prospective application of the ordinance, the Court held, "we may assume that this exercise was successful and that the ordinance as now authoritatively construed would pass constitutional muster". A caveat to this assumption was appended in a footnote to the effect that it would depend, among other things, on the availability of expeditious judicial review of the administrative refusal to issue a permit, a point which was reinforced in Mr. Justice Harlan's concurring opinion.

Applying the holding of *Shuttlesworth, supra*, to the instant case, we have the judicial surgery to Sec. 6 of the statute by the Court in *Sanza, supra*, so that from and after February 8, 1967, it passes constitutional muster. The caveat is satisfied by the provisions of Section 19 assuring prompt judicial review. The definitional standard of the statute is clearly constitutional under the holding in *Shuttlesworth*.

The Court noted in *Shuttlesworth* that the test to be applied, if a narrow construction is to be given retroactive effect, is whether the statute has been administered in "the fair and nondiscriminatory manner which the state court has construed it to require". This test would be easily satisfied by the Censor Board as they have consist-

ently employed the test for obscenity laid down by this Court, and no other test.

The next attack by Appellants is that:

"C. The Maryland Statute Tolerates Long Delays Before Final Judicial Decision."

This is not the first time this Court has been asked to consider the Maryland statute as to the third point raised by Appellant. In *Freedman v. Maryland, supra* (decided March 1, 1965), this Court found the statute to be unconstitutional as a violation of the First Amendment to the Constitution because: if the Board disapproved the film, the exhibitor was required to assume the burden of instituting judicial proceedings and of persuading the court that the film was constitutionally protected expression; 2) after the Board had declined to license the film, its exhibition was prohibited pending judicial review, however long such judicial review might take; and, 3) the Maryland statute provided no assurance of prompt judicial determination.

By Chapter 598 of the Acts of 1965, enacted as an emergency measure, effective April 8, 1965, the General Assembly of Maryland repealed and re-enacted Section 19 of Article 66A, with the obvious intention of fully meeting the three objections set forth in the *Freedman* opinion. The new Section 19 provides that any film duly submitted to the Board for examination and licensing "shall be reviewed and approved within five (5) days, unless the Board shall disapprove" the film under the provisions of Section 6. In the event of disapproval, the Board is required "within not later than three (3) days thereafter, to apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene. . . ." It is also required that "notice of such appli-

cation shall be forthwith sent by first class mail, postage prepaid, to the address of the person presenting such film for licensing". The Circuit Court is required within five days after the filing of the application to conduct a hearing, view the film, and within two days after the hearing, "enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said Section 6 hereof." It is further provided that if the order disapproves the film, then the person presenting the film for licensing may appeal such determination to the Court of Appeals in accordance with the Maryland Rules of Procedure, and the Court of Appeals "shall advance such case upon its hearing calendar to the earliest practicable date" and in its review, the Court of Appeals "shall view the subject film". Then is added, "The burden of proving that the film should not be approved and licensed shall rest on the Board."

In *Trans-Lux v. Maryland Censor Board*, 240 Md. 98, 213 A. 2d 235 (1965), the Court of Appeals of Maryland held that the amendment fully satisfied the constitutional requirements of *Freedman*.

Appellants' argument is that the amendment does not set a time limit within which the Court of Appeals must act, and that the statute is therefore unconstitutional as not meeting the *Freedman* requirement of assuring a "prompt final" judicial decision. Appellant argues that the terminology, "final judicial decision", means the decision of an appellate tribunal. This is clearly not the meaning of the Court in *Freedman*.[10] Final judicial decision in this context means a final determination by a trial court on the merits, reviewing an administrative refusal to li-

[10] This was pointed out by Mr. Justice White in colloquy with counsel during the recent argument in the case of *Byrne v. Karalexis*, *supra*.

cense. The word "final" in this context is used to distinguish an adjudication on the merits after an adversary proceeding from a preliminary injunction. The Court made this clear in *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L. Ed. 2d 966, 88 S. Ct. 754 (1968) in holding that the Chicago censorship ordinance was violative of the *Freedman* standard because "The absence of any provision for a prompt judicial decision by the trial court violates the standard that '. . . the procedure must also assure a prompt final judicial decision". Statutory assurance of prompt judicial decision by the trial court in reviewing the action of the administrative censor is the requirement imposed by *Freedman* and applied in *Teitel*.[11] Appellants here do not contest the statute at issue on these grounds, but rather they would create an additional requirement imposing time limitations on appellate action. Even though no such requirement has been enunciated by this Court, the Maryland statute goes a long way toward implementing such a procedure. It provides that censorship appeals shall be advanced on the calendar of the Court. In the instant case the appeal was advanced on the appellate calendar, and came on for hearing in the shortest possible time compatible with the preparation of the record and briefs. The lengthy opinions of the majority, concurrence and dissent, account for the complained of delay in the issuance of the Court's opinion.

A short review of the history of this case should be made to counter any allusions Appellants make as to State-caused delay. The Censors' determination, the filing of suit and the start of the trial were all within statutory

[11] See Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 518 (1970), in accord, for a more detailed discussion of what is meant by the *Freedman* requirement; see also Mr. Justice Harlan's concurring opinion in *Shuttlesworth, supra*, re permissible delays in movie censorship proceedings.

time limits. The trial lasted two weeks — largely on account of lengthy cross-examination by Appellants of Appellee's witnesses and because of the numerous witnesses produced by Appellants. The trial court's opinion was filed within two days from the conclusion of the trial on July 31, 1968, in accordance with the statute. The lengthy record was not completely transcribed until mid-way through August. Briefs were then submitted prior to appellate argument on September 8 (the first day of the September Term of the Court of Appeals after the summer recess). The case was advanced on the calendar of the Court of Appeals to be heard on that day. There was no request by Appellant for an immediate decision of the Court on the obscenity issue to be followed by an opinion at a later date as had been rendered by the Court in prior obscenity cases, e.g., *Trans-Lux v. Maryland Censor Board, supra*. The Court's lengthy decision was filed on October 22, 1969.

The next point urged by Appellants is that:

"D. The Statute Lacks Procedural Safeguards."

This Court has made clear in *Shuttlesworth, supra*, and *Freedman, supra*, that such a statute is valid if it can pass constitutional muster on two points: (1) if it sets forth proper criteria for the issuance of the license and (2) if there are proper procedural safeguards built into the statute. The Court made it clear in *Freedman* that the procedural safeguards to which it was making reference in this context were the presence of statutory assurance of prompt judicial review of the administrative refusal to license, with the administrative agency having the burden of proof to sustain its action. The Maryland statute does pass muster on these two points and it is therefore not subject to attack on the grounds pressed by Appellants.

The holding of the United States District Court in *Universal Film Exchanges, Inc. v. Chicago*, 288 F. Supp. 286 (N.D. Ill., 1968), dealing with a Chicago censorship statute very similar to our own, is dispositive of Appellants' contention in this respect. There, too, the appellants were attacking the administrative procedure employed by the censor. The Court's holding was:

> "It is the opinion of this Court that findings of an administrative censor are not a constitutional requirement. Since *Freedman . . . [supra]*, it has been clear that only a *de novo* judicial determination that a motion picture is unprotected by the First Amendment can justify a valid final restraint of a motion picture in advance of exhibition. The judiciary is perfectly capable of making its own determination of whether or not a film falls within the proscribed bounds, especially where the statute simply regulates 'obscene' films. A requirement of administrative findings, whether of fact or law, would merely slow down the pre-judicial proceedings, without contributing anything useful to the Court. The role of the preliminary censor under *Freedman v. State of Maryland, supra*, is not to be viewed as the role of a special master or fact finder; rather, the role of the administrative censor is merely to winnow out the harmless motion pictures so that pendente lite restraint on their dissemination may be as short as possible." (p. 293)

Appellants' argument in this respect makes no practical sense. The proceedings before the Board are not of an adversary nature, and they are not contemplated to be so by statute. The Board views the film and seeks expert advice in making its determination as to whether a movie is obscene. If it finds the film to be obscene, the Board must take it to court and carry the burden of proof to support its finding. What was contemplated in *Freedman* has been rigidly adhered to. How the Board made its decision is not

an issue; whether it can prove it was correct is the determinative question. This type of censorship without an adversary proceeding at the administrative level was found to be valid by the Supreme Court in *Times Film Corp. v. Chicago, supra,* and *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957).

X.

THE STATE OF MARYLAND IS NOT BOUND BY A FEDERAL CIRCUIT COURT'S OPINION ON THE OBSCENITY ISSUE

Appellants, in support of their novel constitutional proposition in derogation of our federal form of government, have advanced an ethereal argument to the effect that "breathing space" for free speech requires that the states be enjoined from taking any action against material which has been found to be non-obscene in a federal customs case.

They start with the untenable premise that the United States government is proscribed by virtue of the 2nd Circuit decision from any further judicial action against the film. They then argue that this Court has made repeated reference in various contexts to the importance of leaving "breathing space" for the exercise of the constitutionally protected rights of free speech. In each of the cases they cite, a State law was held to be unconstitutional because it could be improperly applied to affect the exercise of First Amendment rights. The "breathing space" reference in these cases is to the principle that statutes in derogation of the right of free speech must not be vague, as the threat of sanctions under a vague statute can act to inhibit the exercise of the right. This rule is stated by the Court in *NAACP v. Button,* 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963): "Because First Amendment freedoms need breathing space to survive, government may

regulate in the area only with narrow specificity". In the area of obscenity, however, the Court has allowed broader statutory definitions of proscribed material, as further defined by the proper standard for judging obscenity enunciated by the Court. *Roth, supra.*

The right of free speech is not an absolute right, but any legislative attempts to limit it must be narrowly directed to proscribe only conduct or materials which are clearly encompassed by the recognized exceptions to the right. Obscenity is clearly one of these exceptions. *Roth supra.*

As noted above, the "breathing space" requirement is satisfied here by the constitutionally acceptable definition of obscenity in the Maryland statute. The requirement is clearly not applicable to contravene the federal principle of our Constitutional government which recognizes that control of obscene materials is a legitimate field for the exercise of State sovereignty.

Appellants, after misapplying the "breathing space" requirement, attempt to attack the central issue, i.e., is the state foreclosed, because of the action taken in the federal court, from exercising an important element of its sovereignty — the protection of its populace from obscene materials.

The transparency of Appellants' argument in this respect is readily discerned by virtue of their misconstruction of the cited cases. The principle they are attempting to support by cited case law is that a federal judicial holding forecloses future state judicial resolution of the same issue. The first case they cite in support is *Rea v. United States,* 350 U.S. 214, 100 L. Ed. 233, 76 S. Ct. 292 (1966). They argue that this case makes a federal court's determination

of the admissibility of evidence objected to on the grounds of illegal search and seizure *res judicata* as to this issue in a subsequent state prosecution. This is exactly what the Court did not hold. The facts there were that in a federal prosecution for unlawful acquisition of marijuana, the evidence was suppressed by the federal district court and the indictment based on that evidence was dismissed. Thereafter, the petitioner was charged with possession of marijuana in violation of New Mexico law. While awaiting trial in the state court, he filed a motion in the district court to enjoin the federal agent from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search. This Court, in holding that injunctive relief should be granted, noted that the case did not involve a constitutional question, but only one concerning the court's supervisory powers over federal law enforcement agencies. They did not hold that the state court is bound by the federal court finding of inadmissibility — they held only that the federal officer could be enjoined from testifying in the state proceeding. In *Cleary v. Bolger*, 371 U.S. 392, 9 L. Ed. 2d 390, 83 S. Ct. 385 (1963), also cited by Appellants, this Court explicitly ruled that the holding in *Rea, supra*, would not justify an injunction preventing a state officer who participated in a search and seizure with a federal officer from testifying in a state proceeding even if such an injunction would be warranted against the federal officer pursuant to *Rea*. The Court noted:

> "The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, *cf., e.g., Mapp v. Ohio*, 367 U.S. 643 . . ., he may raise the objection in the state courts and then seek review in

this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

Accordingly, the cases cited by Appellants in the search and seizure field contravene the proposition for which they are cited. They hold that state courts are not bound by federal court holdings — if there is error in the state court proceedings, it can be corrected by the Supreme Court.

The cases in the second category cited by Appellant, *Adams v. Maryland*, 347 U.S. 179, 98 L. Ed. 608, 74 S. Ct. 442 (1954) and *Murphy v. Waterfront Commission*, 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) stand merely for the principle that immunity granted by either the state or federal government must govern the other jurisdiction in order to effectively preserve the First Amendment right. These cases are not germane to the principle they are cited to support.

Appellants' bland assertion that *Bartkus v. Illinois*, 359 U.S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959) has been impliedly overruled by *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) is just not correct.[12] The holding in *Bartkus* is based primarily on the concept of federalism and *Benton* does nothing to change this. The only effect of *Benton* was to make the double jeopardy provision of the First Amendment effective against the

[12] The Court of Special Appeals of Maryland in *Melville, et al. v. Maryland*, No. 328, September Term, 1969, decided August 5, 1970, held: "Appellants rely on *Benton v. Maryland*, *supra* and *Murphy v. Waterfront Commission*, 378 U.S. 52 to refute the present effectiveness of *Bartkus*. We find nothing in *Benton* or *Murphy* to indicate that the precise holding in *Bartkus* is no longer effective.

states. Pursuant to it, a State prosecution would be barred only if there has been a prior acquittal in the State courts; a prior federal acquittal would not bar state prosecution.

That is the substance of Appellants' attack on the principle of federalism applied to the facts. They make their attack in a roundabout way, not alleging directly, as they did in the Maryland Court of Appeals, that this is an area where the federal government has preempted State action. Preemption is what they must allege and show before they can prevail on an argument that would contravene the federalism principles. They have abandoned the argument as untenable and have substituted one which would have the same effect — to preempt the states from exercising an important aspect of their police power. They cite no authority which would justify this Court in departing from established concepts of federalism.

Appellants' contention that the State of Maryland is bound by the 2nd Circuit's decision is further refuted through an analysis of that proceeding. The government produced no expert witnesses as we did; the evidence of pandering in the case at bar was not present in the federal case; and the issue was determined by application of a standard adhered to by only a minority of this Court, and which Appellee claims is an improper standard for judging the obscenity issue in general, and in particular, the obscenity of a motion picture. There is the additional unresolved problem as to whether local or national standards are to be the measure — the federal case could not and did not consider Maryland standards in arriving at its decision. This is not an issue in the instant case as even the majority in the 2nd Circuit found the film to be patently offensive; it is an issue, however, which could be present in cases such as this, and this would preclude the adoption of the general rule proposed by Appellants.

This contention could readily have been answered in this brief in the summary fashion in which it was treated by the Court of Appeals below. We adopt its reasoning as further argument on this point:

> "Finally, the Appellants argue that the judgment of the United States Court of Appeals for the 2nd Circuit in *I Am Curious (Yellow)*, *supra*, is conclusive on the State's case in that the federal statute under which adjudication was made must be read as preempting the right of a state later to subject the film to further restraint in advance of public showing. The short answer to this is that the Supreme Court in *Freedman*, *supra*, recognized that as long as a state follows the procedural safeguards suggested therein, it may validly exercise its police power to effectuate a censorship system. It is our belief that only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us. Constitution of Maryland, Declaration of Rights, Article 2."

XI.

THIS COURT'S HOLDING IN *STANLEY v. GEORGIA* DOES NOT FORECLOSE THE STATES FROM PROHIBITING THE COMMERCIAL DISSEMINATION OF OBSCENE MATERIALS.

The Appellants say it does. A similar contention has been raised in *Byrne v. Karalexis*, No. 1149, October Term, 1969, scheduled for re-argument before the Supreme Court during the 1970 October Term. The point has been extensively briefed by the State of Massachusetts in that proceeding, and we adopt its in depth argument as briefed.

This Court's holding in *Stanley v. Georgia*, *supra*, was a limited one: "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene materials a crime. *Roth* and the cases following that decision are not impaired by today's holding." This Court also indicated that "*Roth* and the cases following it

discerned such an important interest in the regulation of commercial distribution of obscene materials" as would justify continued legislative suppression of commercial distribution as opposed to private possession.

Appellee agrees with Appellants' construction of *Stanley* to the effect that it would allow an individual to possess a print of "I Am Curious (Yellow)" in his own home. That is the extent of the *Stanley* holding. The Court did not indicate that an individual could show an obscene film in his living room and charge admission. The Court did not indicate that the distributor who sold the print would be protected from prosecution. The Court certainly did not hold that the obscene movie should be granted protection from state laws when shown in a motion picture theater.

This last extension is one Appellants would have this Court engraft on the *Stanley* rule in this proceeding. The Massachusetts' Brief hereinbefore referred to makes it clear that such an extension is unwarranted.

Appellants proceed from the factual hypothesis that "a film may be exhibited at a theater in a manner that assures no intrusion on sensibilites of unwilling members of the public and no admittance of children", and they apply that hypothesis to the film at issue. Their argument must fall on the facts, before even reaching the law, because the hypothesis cannot be assumed — the facts are not as Appellants would have them. In the first place, what is there that Grove Press has done to apprise the public of the perverse display of sex in the film, other than the pandering scenario? How has the citizen been apprised of the existence of the explicit scenes of fellatio, cunnilingus and copulation? Appellants' allegedly non-pandering newspaper advertisements do not advise the public of these matters, and Appellee submits that unless

an individual is fully informed prior to seeing the movie as to what he is to be subjected to, he is not protected from an unwanted invasion of his privacy. Since such appraisal could not be accomplished without pandering, it is inherently impossible to notify the public in order to protect unwilling people from exposure. The patent inconsistency of Appellants' first factual hypothesis renders it unworthy of consideration. The second factual hypothesis is just not recognized in practice — the money-grabbing "sexploitation" exhibitors do not turn customers away, as was specifically pointed out by Judge Barnes in his concurring opinion. The assumed facts are not borne out in practice, and offer no basis for the ensuing legal argument.

As to the legal argument, the Massachusetts' Brief deals fully with the propriety of state legislation in the obscenity field. It does not deal specifically with Appellants' argument that *Redrup* and *Ginzburg, supra*, establish a limited area of legitimate governmental interests. All that *Ginzburg* held was that pandering could be determinative on the obscenity issue even if the material was not obscene *vel non*. The Court noted that the obscenity *vel non* issue need not be reached when there is pandering. In *Redrup*, the Court continuing in this vein noted that the obscenity *vel non* issue under any of the recognized tests need also not be reached if (1) the material is being considered pursuant to a statute reflecting a specific and limited state concern for juveniles, or, (2) the material is being considered under a statute dealing with intrusion on privacy. The Court did not hold that a State statute must reflect a limited concern for juveniles, or that it focus on any intrusion of privacy, or that it must require pandering. The holding was that absent these considerations, the Justices would apply their respective tests for obscenity *vel non* to the materials in the context of the

state laws generally forbidding dissemination of obscenity. The Court has followed such a course in numerous cases subsequent to *Redrup* in which *Redrup* has been cited as the only authority. *Stanley* has not changed the state of the law in this respect. Statutes generally proscribing publication and sale of obscene materials such as were held valid in *Roth* and which were recognized as having continuing validity in *Redrup* are not affected by *Stanley*. Statutes which proscribe private possession of obscene materials are the only laws in this area affected. Commercial dissemination of obscenity is the issue here; the states clearly have the power to legislate in this area.

XII.

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS.

The facts underlying this contention should be brought to the Court's attention in order that it may be considered in the proper context. The film was submitted for review to the Censor Board in compliance with Article 66A. Pursuant to Section 19, they had five days in which to consider the film. They sought expert advice as to the obscenity of the film from various sources. Upon their failure to license the film, litigation pursuant to Section 19 was in order and the matter was referred to counsel for the Board, the Attorney General of Maryland. Additional expert witnesses viewed the film at the behest of the Attorney General's office in preparing for trial. Counsel then selected which expert witnesses were to testify as to each of the *Memoirs* tests. Other expert witnesses who viewed the film at the State's request were not called for a number of reasons — either their testimony would be cumulative, or their testimony would not in all respects be helpful, or they would be unavailable to testify. An adversary civil trial followed in which the State produced four expert witnesses in furtherance of its case and Appellants

produced eight such witnesses. The exact identity of Appellants' witnesses was never made known to the State prior to their being called — this despite the State having forewarned Appellants verbally before the trial began as to the identity of the witnesses whom it would produce.

Appellants would have this Court extend the criminal due process rule of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) to this adversary civil proceeding in order to reach the work product of the Attorney General accumulated in the preparation of the case. They cite no authority for this proposition; accordingly, it must be rejected.

They then go on to the argument that even if the principle is limited to criminal cases, it should apply here. They allege that the Board's failure to license is equivalent to seizure of the print — this is not correct. If the Board's failure to license is either sustained or overruled in the courts, the print is returned with the outcome of the litigation being determinative of whether it may be exhibited in the State. The procedure is not in any way anomalous to that recognized in *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965) wherein it was recognized that a proceeding for the forfeiture of property used in violating a criminal law is quasi-criminal in character. Appellants' attempt to equate a civil adversary obscenity trial into a quasi-criminal proceeding must, therefore, fail.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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